(5)

No. 98-762

Supreme Court, U.S.
FILED
JAN 25 1999
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,
v.
ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT P. GALLAGHER *
WILLIAM F. HANRAHAN
THOMAS S. GIGOT
GROOM LAW GROUP, CHTD.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 857-0620

MICHAEL R. PENNINGTON
JAMES S. CHRISTIE, JR.
BRADLEY ARANT ROSE & WHITE, LLP
2001 Park Place
Birmingham, AL 35203
(205) 521-8000
Counsel for Petitioner South Carolina National Bank

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13pp

TABLE OF CONTENTS

	Page
The Eleventh Circuit Decision Conflicts With Decisions of This Court and Other Courts of Appeals Recognizing That a Government Agency Is Bound by the Doctrine of Representative Claim Preclusion When the Agency Sues in a Representative Capacity	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases — Page

Chicago, Rock Island and Pac. Ry. Co. v. Schendel, 270 U.S. 611 (1926) 3, 8
Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) 2
Durfee v. Duke, 375 U.S. 106 (1963) 4
EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 5
EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987) 5
EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993) 2, 3, 4, 5, 7, 9
EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) 3, 5, 9
EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990) 3, 4, 5, 9
FTC v. AMREP Corp., 705 F. Supp. 119 (S.D.N.Y. 1988) 3
In re Imperial Corp., 92 F.3d 1503 (9th Cir. 1996) 3
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8, 9
Mississippi v. Louisiana, 506 U.S. 73 (1992) 4, 5
Richards v. Jefferson County, 517 U.S. 793 (1996) 7

Statutes

Age Discrimination in Employment Act of 1967, section 7(b), 29 U.S.C. § 626(b) 2
Americans with Disabilities Act of 1990, section 107(a), 42 U.S.C. § 12117(a) 2
Civil Rights Act of 1964, section 706, 42 U.S.C. § 2000e-5 2
Federal Trade Commission Act section 206, 15 U.S.C. § 57b 2
Employee Retirement Income Security Act of 1974, section 409(a), 29 U.S.C. § 1109(a) 2, 8
section 502(a)(2), 29 U.S.C. § 1132(a)(2) 2, 8
section 502(a)(5), 29 U.S.C. § 1132(a)(5) 1

TABLE OF AUTHORITIES—Continued

Page

section 502(h), 29 U.S.C. § 1132(h) 6
section 502(l), 29 U.S.C. § 1132(l) 9

Other Materials

29 C.F.R. § 1601.28(a) (1997) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-762

SOUTH CAROLINA NATIONAL BANK,
Petitioner,

v.

ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

The Eleventh Circuit Decision Conflicts With Decisions of This Court and Other Courts of Appeals Recognizing That a Government Agency Is Bound by the Doctrine of Representative Claim Preclusion When the Agency Sues in a Representative Capacity.

Petitioner South Carolina National Bank ("SCNB"), as trustee of an employee stock ownership plan ("ESOP"), allegedly overpaid for shares of the sponsoring employer's stock that it had purchased for the accounts of participating employees. App. 3a-4a. The participants sued and resolved the overpayment question by agreeing, in a court-approved class action and derivative action settlement agreement, to accept $12.3 million in cash payable to the ESOP, plus other consideration. R3-75, R-4-99, R4-100. In a subsequent lawsuit against SCNB, respondent, the Secretary of the United States Department of Labor (the "Secretary"), sought injunctive and declaratory relief for the benefit of the public at large, as she is entitled to do under section 502(a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a)(5) (1994 & Supp. II 1996), in order "to determine

the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to *any* future ERISA plan participant." *Donovan v. Cunningham*, 716 F.2d 1455, 1462 & n.10 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (private parties' adjudication does not bar the Secretary from bringing a subsequent enforcement action for equitable relief, although it may nonetheless affect "the scope of relief" available to the Secretary) (emphasis in original).

But respondent now says that the government also should be allowed a second claim against SCNB, under sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. §§ 1132(a)(2), 1109(a), to recover more money for the ESOP and its participants. Nowhere, however, does respondent advance any colorable explanation as to why Title I of ERISA, alone in the remedial scheme of federal law, authorizes this second bite at the apple.

Federal law often allows the government to enforce both a private right of recovery and a public right to broader equitable relief.[1] The government can sue, for example, to force a company to stop applying racial, sex, age, or disability criteria in its hiring decisions. *See, e.g.*, 42 U.S.C. § 2000e-5(f), (g) (civil actions and remedies under Title VII). As an adjunct to that power, the government can also recover monetary relief, payable to the individual victims of such discrimination, to compensate them for the effects of the unlawful conduct. *Id.* But none of these remedial schemes allows the government, or the wronged individuals, to have a second try at recovering the victim's losses. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289-93 (7th Cir. 1993) (although prior adjudication by grievant under Title VII and ADEA does not bar government from seeking injunctive relief to

---

[1] *See, e.g.*, Federal Trade Commission Act § 206(a), (b), 15 U.S.C. § 57b(a), (b); Age Discrimination in Employment Act of 1967 ("ADEA") § 7(b), 29 U.S.C. § 626(b); Title VII of the Civil Rights Act of 1964 ("Title VII") § 706, 42 U.S.C. § 2000e-5 (1994); Americans with Disabilities Act of 1990 § 107(a), 42 U.S.C. § 12117.

benefit the public interest, it does bar the government from seeking more money for the grievant); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 124 (S.D.N.Y. 1988) (to the same effect with respect to claim under Federal Trade Commission Act).

In this case, the Eleventh Circuit ruled that the government can make a second try for money damages payable to the settling participants' ESOP. The court of appeals decided that the government is never barred from making a second claim for private monetary relief when "the government's action seeks to enforce a federal statute that implicates both public and private interests." App. 22a.

As shown in SCNB's petition, the Eleventh Circuit's decision in this respect is in direct conflict with this Court's decision in *Chicago, Rock Island and Pacific Railway Co. v. Schendel,* 270 U.S. 611 (1926), and with decisions of other circuit courts of appeals in, among others, *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Harris Chernin, Inc.*, 10 F.3d 1286; *In re Imperial Corp.*, 92 F.3d 1503 (9th Cir. 1996); and *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990).

In *Schendel*, the Court observed that "where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against [the private party] personally, determining the same issues, was available as an estoppel against the government." 270 U.S. at 619. In *Kidder, Peabody & Co., Harris Chernin, Inc., and United States Steel Corp.*, among others, the courts of appeals have applied this bedrock principle of law to disputes arising under other federal statutes, including Title VII and the ADEA. These decisions uniformly hold that a private settlement or adjudication by a private person bars the government agency from later suing to recover additional money for the private person, even though, as here, the government remains free to sue for broader equitable relief to benefit the public interest by enjoining unlawful activity. *Kidder, Peabody & Co.*, 156 F.3d at

301-02; *Harris Chernin, Inc.*, 10 F.3d at 1289-93; *United States Steel Corp.*, 921 F.2d at 493-97.

Respondent tries without success to explain this conflict away. She acknowledges, as she must in the wake of *Schendel*, that preclusion can apply when the government sues in a representative capacity to enforce a private right of recovery only. *See* Respondent's Brief in Opposition at 16-17 (asserting that the "clear premise" in *Schendel* was that the government sued "for the sole benefit" of the private person). But respondent contends that when the government sues to enforce both a private right of recovery and a public right—or in respondent's words, when the government "represents *more* than merely private interests"—there is no preclusion whatsoever, even as to the private right of recovery. Respondent's Brief in Opposition at 17 (emphasis in original).

Respondent's contention finds no support in this Court's prior decisions. Indeed, as shown in SCNB's petition, each of the Court's decisions that the Eleventh Circuit relied upon involved a case where the government sued to enforce a public right only and that right was separate from the private claim resolved by the prior adjudication. *See* 98-762 Pet. 12-15 (discussing *Hathorn v. Lovorn*, 457 U.S. 255 (1982); *City of Richmond v. United States*, 422 U.S. 358 (1975); and *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961)). The two additional decisions from this Court that respondent cites at page 11 of her brief in opposition, *Durfee v. Duke*, 375 U.S. 106 (1963), and *Mississippi v. Louisiana*, 506 U.S. 73 (1992), are not materially different. They address the preclusive effect of a final judgment rendered in a quiet title action brought by the resident of one state against the resident of an adjacent state. In each case, this Court observed that the private parties' adjudication of their individual property interests would not bind the two states, in their sovereign capacities, from contesting the boundary between them. *Durfee v. Duke*, 375 U.S. at 115; *Mississippi v. Louisiana*, 506 U.S. at 78. The decisions do not hold, as respondent seems to suggest, that the states could

sue anew to enlarge the property rights of the losing private litigant. In fact, the Court expressly noted in *Mississippi v. Louisiana* that the lower courts had mistakenly "intermixed the questions of title to real property and of the location of the state boundary." *Id.* at 78.

Respondent's contention that there is no preclusion when the government sues to enforce both a public right of action and a private right of recovery is directly at odds with *Kidder, Peabody & Co.*, 156 F.3d 298; *Harris Chernin, Inc.*, 10 F.3d 1286; and *United States Steel Corp.*, 921 F.2d 489, among others. In *United States Steel Corp.*, for example, the EEOC observed that its authority to sue under the ADEA benefited both the public interest and the private interest of the individual victim of age discrimination. From this, the agency argued that a prior adjudication of the individual's claim did not preclude the agency, in any respect, because the agency had a "broader independent public interest different from that of an individual grievant." 921 F.2d at 496. The Third Circuit, however, squarely rejected that contention:

> The Commission's description of its enforcement role under the ADEA is accurate and important, but this description fails to distinguish between the EEOC's role in protecting the public interest and its role in vindicating specific private claims. . . . [W]hen the Commission seeks individualized benefits under the ADEA for particular grievants . . . the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.

Id.; see Kidder, Peabody & Co., 156 F.3d at 301-302; *Harris Chernin, Inc.*, 10 F.3d at 1289-1293; *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-1543 (9th Cir. 1987), all to the same effect.

Respondent argues that these decisions of the Second, Third, Fifth, Seventh, and Ninth Circuits are distinguishable because the enforcement schemes in the ADEA and Title VII require private claimants first to notify the

agency of their grievances and then to await some agency action (*e.g.*, issuance of a "right to sue" letter under Title VII) before suing. According to respondent, "the EEOC's mandatory pre-litigation involvement, and its large degree of control over the initiation of private litigation, may justify according such litigation some limited preclusive effect with respect to later public suits." Respondent's Brief in Opposition at 19.

But this is no distinction at all. Like Title VII and the ADEA, Title I of ERISA requires private claimants to notify the government of their grievances. Specifically, section 502(h) of ERISA requires private plaintiffs to serve a copy of their complaint on both "the Secretary and the Secretary of the Treasury." 29 U.S.C. § 1132(h). Like Title VII and the ADEA, Title I of ERISA also gives the government agency an opportunity to take action, in its own name, to pursue the individuals' grievances and to obtain a private remedy on their behalf. Specifically, section 502(h) authorizes the Secretary to intervene as a matter of right in any private litigation commenced under section 502(a)(2) of ERISA. And where, as here, the private litigation is maintained as a class action or derivative action under Rule 23 or 23.1 of the Federal Rules of Civil Procedure, there is a fairness hearing on any proposed settlement. In sum, the Secretary has no less "involvement" and "control" with respect to claims for private relief under sections 502(a)(2) and 409(a) of ERISA than the EEOC has with respect to complaints brought under Title VII or the ADEA.[2]

More important, the degree of government control and involvement is not what matters under the claim preclu-

---

[2] To say that the EEOC exercises "control" over the initiation of private litigation is an overstatement. For example, after a Title VII charge has been pending with the agency for a minimum number of days, and if the grievant wishes to commence a private lawsuit, the EEOC's regulations mandate that the agency "shall promptly issue" a right-to-sue letter to the grievant, 29 C.F.R. § 1601.28(a), even though the agency's investigation continues.

sion doctrine applied by this Court in *Schendel* and by the courts of appeals in *Kidder, Peabody & Co., Harris Chernin, Inc.*, and *United States Steel Corp.* As this Court explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), a non-party can be precluded on at least two different and independent bases—either because the nonparty exercised "control of litigation on behalf of one of the parties in the litigation," *id.* at 798 (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)), or because "it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards v. Jefferson County*, 517 U.S. at 798. The first of these bases applies when the non-party's interest is different from the litigant's, but the non-party is treated as if his interest had been represented in the litigation because of control over it. The latter of the bases—privity of interest—applies when the non-party and the actual litigant have, in substance, an identity of interest. Privity, as respondent correctly observes, "is essentially a matter of identity of interests." Respondent's Brief in Opposition at 10 (citing *Richards v. Jefferson County*, 517 U.S. at 798). It is not defined by the degree of control that the non-party exercised over the prior litigation.

The decisions in *Schendel, Kidder, Peabody & Co., Harris Chernin, Inc.*, and *United States Steel Corp.* turn on the identity of interest between the government agency and the individuals for whom it sought money, not on the degree of control that the agency exercised over the individuals' private claims. As the Seventh Circuit summarized in *Harris Chernin, Inc.*, for example, claim preclusion applies to EEOC claims for monetary relief because "there is privity between the EEOC and individuals for whom it seeks individual benefits." 10 F.3d at 1291.

This rule of representative claim preclusion, moreover, is not confined to cases brought by the EEOC under Title VII or the ADEA. It extends to all cases in which the

government seeks money on behalf of private parties, as illustrated by the cases cited at pages 11-12 of SCNB's petition and pages 14-15 of the petition in No. 98-758.

Likewise, *Schendel* makes clear that the preclusive effect of a prior adjudication is not constrained by the statutory or common-law source of the government's claim for relief. Rather, the effect is controlled by the fact that the government and private individual have, in substance, an identity of interest. Where they do, the government is bound by the prior adjudication of the private right, regardless of whether the government is suing under a specific statute or in furtherance of its general right to sue. The controlling question, in short, is not whether the government is invoking a particular statute, but whether there has been a "previous adjudication[] against the real party in interest." *Schendel*, 270 U.S. at 619. If there has been, "the government should be held estopped." *Id.*

Recognizing this, respondent resorts to disputing that the injured plan and its participants are the real parties in interest with respect to a claim for money damages under sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. §§ 1132(a)(2), 1109(a). Respondent argues in particular that, when the government is the one bringing a claim for money damages under those sections, the government acts in pursuit of interests that "transcend" those of the plan and its participants. Respondent's Brief in Opposition at 12.

Yet, respondent concedes that any and all money damages recovered under those sections would be paid over to the ESOP and ultimately to its participants—here, the very same participants whose identical claims were resolved by the final consent judgment in the *Knop* action —and that under *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), claims brought by the Secretary under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), are "brought in a representative capacity on behalf of the plan as a whole." Respondent's

Brief in Opposition at 14 (quoting *Russell*, 473 U.S. at 142 n.9). On this point, *Russell* states unequivocally:

> Inclusion of the Secretary of Labor [as one of the four classes of plaintiffs authorized to sue under 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes [of plaintiffs] is in the financial integrity of the plan. . . . And the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself.

Russell, 473 U.S. at 142 n.9, 144.

Respondent's contention that public interests are always at stake when the government sues proves too much. The public's interest in enforcing ERISA is surely no more important than that of the EEOC in enforcing Title VII and the ADEA, yet it is undisputed that representative claim preclusion applies to the EEOC (and to other agencies) in analogous circumstances. Indeed, under respondent's theory, it could equally be said that public interests are at stake whenever any private person sues under a statutory or common law rule of general applicability, because adjudication of the private claimant's suit also will help to establish precedent and to deter other wrongdoers. But these results—common to all litigation—do not eliminate the preclusive effect of the individual adjudication, nor do they affect the representative claim preclusion analysis described by the Court's decision in *Schendel* and by the Second, Third, and Seventh Circuit's decisions in *Kidder, Peabody & Co.*, 156 F.3d 298; *Harris Chernin, Inc.*, 10 F.3d 1286; and *United States Steel Corp.*, 921 F.2d 489.[3]

---

[3] Respondent observes that section 502(l) of ERISA, 29 U.S.C. § 1132(l), allows her to assess a civil penalty on any amount recovered under a judgment or settlement to which she is a party. Respondent's Brief in Opposition at 13. But nothing in section 502(1) trumps the fundamental claim preclusion rules that undergird the nation's laws generally. By its plain terms, section 501(1)

The Eleventh Circuit's decision not only creates an irreconcilable conflict with *Schendel, Kidder, Peabody & Co., Harris Chernin, Inc., United States Steel Corp.*, and similar decisions, but it also threatens the sound administration of justice by undermining the ability of private claimants to obtain recovery on their own behalf. If, as the Eleventh Circuit states, a government claim for monetary relief on behalf of a private person is not precluded "when the government's action seeks to enforce a federal statute that implicates both public and private interests," then private litigants necessarily suffer. Defendants in the future will either not settle litigation brought by a private party unless the government also participates (as respondent refused to do in the *Knop* class action here) or, if defendants do settle, they will settle for less money in order to reflect the risk that the government may initiate a second monetary claim later. Either way, this result takes away from private claimants—the very persons who suffered the pecuniary injury—what it purports to give the government. This result cannot be reconciled with a statutory enforcement scheme, like ERISA's, that gives private claimants authority to seek redress on their own behalf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT P. GALLAGHER *
GROOM LAW GROUP, CHTD.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 857-0620
Counsel for Petitioner

* Counsel of Record

---

applies only when there is an action to be brought by the Secretary of Labor, not when the plan participants whose money is actually at stake have extinguished the plan's claim for money in a private litigation. Properly understood, section 502(1) is merely the added cost of being on the losing side of a government lawsuit, and thus operates to encourage private resolution of ERISA disputes.